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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

OCTOBER TERM—1954

No. 708

ANGLO CHINESE SHIPPING COMPANY, LTD.,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review an order of January 11, 1955, of the United States Court of Claims dismissing, for lack of jurisdiction of the subject matter, the petitioner's petition in that court in an action against the United States.

Opinion Below

The opinion of the Court of Claims is not as yet officially reported. An unofficial report is published in 127 F. Supp. at page 553.

Jurisdiction

The order of the Court of Claims was dated and entered on January 11, 1955.

The jurisdiction of this Court is invoked under 28 U. S. C. Section 1255(1).

Questions Presented

The questions presented for review are:

1. Whether the petitioner's vessel was requisitioned by the armed forces which occupied Japan, following that country's surrender, which included armed forces of the United States, where, prior to December 3, 1946, the vessel was reported to the General Headquarters of the Supreme Commander of the occupying forces by the Japanese Government as identifiable looted property available for return to its owner and such General Headquarters of the occupying forces so advised the British Government who in turn so advised the petitioner, but contrary to such advices the General Headquarters of the occupying forces in January, 1947, directed the vessel to be retained in Japanese waters to be used as directed by such General Headquarters so that the vessel was not returned to the petitioner until August, 1950, when the General Headquarters of the occupying forces so directed.

2. Where there was a requisition of petitioner's vessel by the forces occupying Japan and in which the United States participated, does the Court of Claims have jurisdiction of the subject matter of an action brought against the United States by the petitioner as owner to recover compensation for the requisition of its vessel.

Constitutional Provision Involved

The petitioner's claim against the United States involves that part of the Fifth Amendment of the Constitution of the United States which states:

> "* * * nor shall private property be taken for public use, without just compensation".

The Government's motion to dismiss the petition was based upon various instruments, agreements and documents relating to the surrender and occupation of Japan, some of which were officially reported but all of which were printed in various State Department Publications. By agreement of the parties such publications were made part of the record in the court below and part of the certified transcript of record in this Court. These documents are lengthy but the pertinent parts are quoted in the petition and where reference is made to a document, the State Department Publication number and page is given.

Such documents as are officially reported and their official citation are as follows:

> Instrument of Japanese Surrender dated September 2, 1945 reported in 59 Stat. 1733 (also to be found in *"Occupation of Japan.—Policy and Progress"*—State Department Publication 2671—Far Eastern Series 17 at pages 62-63).
>
> Agreement signed at Yalta dated February 11, 1945 reported in 59 Stat. 1823 (also to be found in *"Occupation of Japan—Policy and Progress"*—State Department Publication 2671—Far Eastern Series 17 at pages 52-53).

Agreement of Foreign Ministers at Moscow dated December 27, 1945—reported in 60 Stat. 1899 (also to be found in *"Occupation of Japan—Policy and Progress"*—State Department Publication 2671—Far Eastern Series 17 at pages 69-73).

Statement

The questions presented for review arise by reason of the granting by the Court of Claims of respondent's motion to dismiss the petitioner's petition in that court on the ground that the court lacked jurisdiction of the subject matter. Such motion was made before filing of the Government's answer to the petitioner's petition.

Petitioner is a British corporation and was the owner of the S. S. "Josephine Moller" at all material times involved. On December 7, 1941, the Japanese Government declared war on Great Britain and the United States and in the conduct of its military operations Japan captured and occupied Hong Kong. During the occupation of Hong Kong the Japanese Government took possession of the petitioner's vessel, renamed her the "Sagami Maru" and appropriated her for its own use.

On August 10, 1945, the Japanese offered to surrender to the United States, Great Britain, Russia and China (see Appendix 4, *Occupation of Japan—Policy and Progress*—State Department Publication 2671—Far Eastern Series 17, pp. 56-57). The United States Secretary of State in his reply on behalf of such four nations (see Appendix 5, *Occupation of Japan, ibid.*, pp. 57-58) informed the Japanese Gov-

ernment that surrender must be in accordance with the Postdam Proclamation and that the Japanese Government was to be ruled by the "Supreme Commander of the Allied powers".

On August 14, 1945, the Japanese Government accepted the terms of the surrender and the President of the United States announced (see Appendix 6, *Occupation of Japan, ibid.,* pp. 59-60) that General MacArthur had been appointed the Supreme Allied Commander to receive the Japanese surrender. On the same day the United States Secretary of State notified the Japanese Government (see Appendix 7, *Occupation of Japan, ibid.,* pp. 60-61) that for the purpose of receiving the surrender and carrying it into effect, General MacArthur had been designated as the "Supreme Commander for the Allied powers".

On August 21, 1945, the United States proposed to China, Great Britain and the Soviet Union, the establishment of a Far Eastern Advisory Commission (see Appendix 11, *Occupation of Japan, ibid.,* pp. 67-68) to make "recommendations" as to the accomplishment of the terms of surrender.

On August 29, 1945, the U. S. Departments of State, War and Navy prepared a document designated "United States Initial Post Surrender Policy for Japan". The substance of the document was sent to the Supreme Commander on August 29, 1945 by radio and a copy was sent by messenger on September 6, 1945. This document (see Appendix 13, *Occupation of Japan, ibid.,* pp. 73-81) set forth that the objectives of the United States in the occupation were to be satisfied and that—

"There will be a military occupation of the

Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above. The occupation shall have the *character* of an operation in behalf of the principal allied powers acting in the interests of the United Nations at War with Japan. For that reason, participation of the forces of other nations that have taken a leading part in the war against Japan will be welcomed and expected. *The occupation forces will be under the command of a Supreme Commander designated by the United States.*

Although every effort will be made, by consultation and by constitution of appropriate *advisory bodies,* to establish policies for the conduct of the occupation and the control of Japan which will satisfy the principal Allied Powers, *in the event of any differences of opinion among them, the policies of the United States will govern.*

* * * *

Full and prompt restitution will be required of all identifiable looted property." (Emphasis supplied.)

On September 2, 1945, the Instrument of Surrender (see Appendix 8, *Occupation of Japan, ibid.,* pp. 62-63) was signed. At the same time, the occupation forces, composed in the main of United States troops, landed in Japan and commenced (see *Activities of The Far Eastern Commission,* Report of Secretary General, Department of State Publication 2888, p. 1) the enforcement of directives issued by the Supreme Commander in accordance with policy directives issued to him by the United States Government.

On October 30, 1945, the Far Eastern Advisory Commission convened in Washington and met regularly over the next two months to make "recommendations" as to the fulfillment by Japan of its obligations under the instrument of surrender. The Soviet Union, however, declined to participate in the Far Eastern Advisory Commission because of its advisory character (see *Activities of The Far Eastern Commission, ibid.*, p. 2).

On December 27, 1945, the Moscow Agreement was reached under which the Soviet Union was to participate in the occupation of Japan. By such Agreement (see Appendix 12, *Occupation of Japan, ibid.*, pp. 69-73) a Far Eastern Commission was formed to succeed the Far Eastern Advisory Commission. In such Agreement, it was provided—

"II. * * *

C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan, and *will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.*

III. *Functions of the United States Government*

1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implemen-

tation of the directives which express the policy decisions of the Commission

* * * *

3. The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.

* * * *

V. * * *

2. The Commission may take action by less than unanimous vote provided that action shall have the concurrence of at least a majority of all the representatives including the representatives of the four following Powers: United States, United Kingdom, Union of Soviet Socialist Republics and China." (Emphasis supplied.)

There was excluded from the Far Eastern Advisory Commission, as well as from the Far Eastern Commission, the authority to make any "recommendations with regard to the conduct of military operations" (see, Appendix 11, Appendix 12, *Occupation of Japan, ibid.*, pp. 67-73).

The first meeting of the Far Eastern Commission was held in Washington on February 26, 1946 (see, *Activities of The Far Eastern Commission, ibid.*, p. 2).

On April 19, 1946, in accordance with the instructions sent to the Supreme Commander on August 29, 1945, in the document entitled "United States Initial Post Surrender Policy for Japan" and prior to any policy decision by the Far Eastern Commission relating to restitution of looted property, the Supreme Commander sent a memorandum directive to the Japanese Government directing it "to seek out, inventory and impound immediately all identifiable looted property" and submit the completed inventory to the General Headquarters of the Supreme Commander (see copy of Supreme Commander's memorandum directive attached to certified transcript of record).

On July 18, 1946, the Far Eastern Commission announced a Policy decision regarding "Restitution of Looted Property", which it amended on October 10, 1946, and which (see, Appendices 27 and 28, *Activities of The Far Eastern Commission, ibid., pp.* 80-83) as amended among other things provided as follows:

> "1. Immediate steps should be taken to restore to Allied countries objects in the four categories listed below which are found in Japan and which are identified as having been located in an Allied country at the time of the occupation of that country, * * *. Restitution of any object included in category *a* which follows should be deferred, however, so long as its retention is required for the safety of the occupation forces. In such cases the Supreme Commander for the Allied Powers should provide an explanation of reasons

for retention and an estimated date of restoration.

a Industrial and transportation machinery and equipment.

* * * *

2. Steps should be taken to restore Allied countries ships of all types and sizes found in Japanese waters which are identified as having been registered in an Allied country at the time of seizure or sinking by the Japanese or their agents, or at the time of acquisition by the Japanese or their agents by fraud or duress. * * * Restitution of such Allied vessels, if seaworthy, should be accomplished as rapidly as conditions permit and should be completed not later than December 31, 1946. Salvage, repair or refitting should be completed as soon as possible but not necessarily before 31 December 1946."

In accordance with the memorandum directive of April 19, 1946, of the Supreme Commander of the occupation forces, the Japanese Government reported the petitioner's vessel as identifiable looted property located at Yokohama. The Supreme Commander of the occupation forces at sometime prior to December 3, 1946, notified the British Ministry of Shipping that the vessel had been identified and was available for return to her owners. On or about December 3, 1946, the British Ministry similarly notified the petitioner.

However, on January 10, 1947, the General Headquarters of the Supreme Commander of the occupation forces, contrary to their previous advices, directed that the vessel be retained and used in the occupation

as directed by it with the result that the vessel was not returned to the petitioner until August 4, 1950.

Copies of the directives issued by the General Headquarters of the Supreme Commander to the Japanese Government directing the petitioner's vessel to be retained in Japanese waters for the purpose of laying and repairing submarine cables as directed by the Supreme Commander for the Allied Powers and for the return of the vessel on August 4, 1950, are attached to the petition filed in the Court of Claims and marked Schedules A to I (see copy of petition filed in Court of Claims, attached to certified transcript of record).

On September 8, 1951, the Treaty of Peace with Japan was signed at San Francisco (see *Treaty of Peace With Japan*, State Department Publication 4613). By its ratification the Treaty of Peace came into effect on April 28, 1952. On April 25, 1952, the United States (see extract from Federal Register, April 25, 1952 attached to certified transcript of record) terminated the office and authority of the Supreme Commander for the Allied Powers, Japan.

No compensation having been paid to the petitioner for the use of the vessel, this action was brought against the United States.

Reasons for Allowance of the Writ

This case presents important questions of federal law which have not been, but should be settled and decided by this Court.

The questions involve the responsibility and liability of the United States, as one of the occupying powers of Japan after that country's surrender, for

compensation for property taken or used in Japan by the occupation forces and which property was owned by non-enemy citizens and subjects.

Such questions are of importance, not only to the petitioner but also to American owners of property located in Japan which was used or taken or requisitioned by the occupation forces.

In its opinion (see Appendix to this petition) the Court of Claims, although recognizing that the United States participated in a joint venture with other nations, held it was not necessary to pass on the obligations of the United States as party to such joint venture as in their opinion none of the Allied Powers was liable because petitioner's vessel did not come into the possession of the Occupying Powers who were parties to such joint venture.

In holding that petitioner's vessel did not come into the possession of the Occupying Powers it is submitted that the Court of Claims was in error since it misapprehended the law with regard to requisition of vessels.

The law recognizes that there can be a requisition of the *use* of a vessel with or without possession.

Thus, in *Compania Espanola* v. *Navemar*, 303 U. S. 68, this Court recognized such requisition where, at page 75, Mr. Justice Stone in his opinion said:

> "The district court concluded, rightly we think, that the evidence at hand did not support the claim of the suggestion that the 'Navemar' had been in the possession of the Spanish Govern-

ment. The decree of attachment, without more, did not operate to change the possession which, before the decree, was admittedly in petitioner. To accomplish that result, since the decree was *in invitum, actual possession by some act of* physical dominion or *control* in behalf of the Spanish Government, was needful, *The Davis,* 10 Wall. 15, 21; *Long* v. *The Tampico,* 16 Fed. 491, 493, 494; *The Attualita, supra; The Carlo Poma,* 259 Fed. 369, 370, reversed on other grounds, 255 U. S. 219, *or at least some recognition on the part of the ship's officers that they were controlling the vessel and crew in behalf of their government.* * * *" (Emphasis supplied.)

In *Mitsubishi Shoji Kaisha* v. *Societe Purfina Maritime,* 133 F. (2d) 552, certiorari denied 63 S. Ct. 858, the Circuit Court of Appeals for the Ninth Circuit said at page 554:

"The word 'requisitioned' is not one of art. As was said by Lord Justice Pickford of the British Court of Appeals in The Broadmayne, [1916] P. 64, 114 L. T. R. 891, 'There is no particular magic in the word [requisition] itself; it does not connote the same state of things in every particular case.' Its various meanings are determinable in a specific instance by other facts. It may mean that the vessel's title is taken, as in a condemnation proceeding, or her exclusive or partial use for the requisitioning government, or merely that her ownership and earnings remain in her owner, but only for such voyages as are permitted or directed by the government with a view to the national interest."

The decisions of the English Courts are to the same effect.

In *Compania Naviera Vascongado* v. *S. S. "Cristina"*, 1938 Appeal Cases 485, Lord Wright, at page 507 said:

> "The appellants, while not contesting the general principle, have denied that it applies to the facts of the present case, for various reasons. In the first place they have relied on the fact that the Spanish Government had no property (in the sense of ownership) in the 'Cristina', whereas in 'The Parlement Belge' the Belgian Government was the owner of the mail packet. But the rule is not limited to ownership. It applies to cases where what the Government has is a lesser interest, which may be not merely not proprietary but *not even possessory. Thus it has been applied to vessels requisitioned by a Government, where in consequence of the requisition, the vessel, whether or not it is in the possession of the foreign State, is subject to its direction and employed under it orders.* * * *" (Emphasis supplied.)

In the case of *The Meandros*, 1925 Probate 61, the Court said at page 65:

> "The next question is as to requisition. The effect of requisition may be of the most various kinds. It is not an operation of stereotyped form. Requisition is not a term of art. It is barely more than a colloquial expression which has come into use during recent years. It has some connection with a term with which English people became

> familiar twenty-five years ago—the term 'commandeering.' A requisition is a process by which the State takes *the use* or the possession of, or the property in, chattels, and sometimes in land. But it is infinitely various. If, for instance, a stack of hay is requisitioned, it is requisitioned to be consumed; if premises are requisitioned they are requisitioned to be occupied; and if a ship is requisitioned it may be requisitioned for the purpose of being sent to sea, or sunk at the mouth of a harbour, or for a purpose which is satisfied the next day. * * *" (Emphasis supplied.)

In the present case the directives issued by General Headquarters of the Supreme Commander for the Allied Powers who was the Supreme Commander of the occupation forces provided that petitioner's vessel was to "be retained in Japanese waters for the purpose of laying and repairing submarine cables, *as directed by the Supreme Commander for the Allied Powers*" (see Schedules A to C attached to petitioner's petition filed in the Court of Claims, attached to certified transcript of record).

Such direction and control, together with the actual retention of the vessel, it is respectfully submitted, was possession of petitioner's vessel by the occupation forces within the decisions cited above.

The question therefore arises as to whether an action can be brought against the United States as a result of its participation in the occupation of Japan for the compensation for the requisition of petitioner's vessel by the occupation forces.

The Fifth Amendment to the United States Constitution provides among other things——

> "* * * Nor shall private property be taken for public use without just compensation".

Such provision of the Constitution for compensation by the United States extends not only to American citizens but to aliens and to the taking of property by United States forces located outside of the United States.

> *Russian Volunteer Fleet* v. *United States,* 282 U. S. 481;
> *Turney, Trustee* v. *United States,* 126 Court of Claims 202; 115 F. Supp. 457;
> *Philippine Sugar Estates Development Co.* v. *United States,* 40 Court of Claims 33;
> *Baras Plantation Co.* v. *United States,* 105 F. Supp. 1003;
> *Gonzolez* v. *United States,* 106 F. Supp. 180.

That compensation is to be paid to an owner of property which is requisitioned for use by any government is a universal law. Thus, under Article 53 of Section III of the 1907 Hague Regulations (36 Stat. 2277) it is stated—

> "All appliances, whether on land, at sea, or in the air, adapted for the transmission of news, or for the transport of persons or things * * * may be seized, even if they belong to private individuals, but must be restored and compensation fixed when peace is made."

See, also, *Digest of International Law,* Department of State Publication 1961, pages 638 *et seq.; Hals-*

bury's Laws of England, 1939 Continuation Volume, Vol. 32, pages 1013, 1020-1022, 1028-1029; *Cases on Readings on Soviet Law,* by John W. Hazard and Morris L. Weissburg, page 368; 137 A. L. R. 1290.

The publications of the Department of State submitted on the motion below and which are part of the record submitted herewith nowhere indicate any intention on the part of the United States, by participating in the occupation, to escape the provisions of the Fifth Amendment.

Such publications also disclose that the Supreme Commander for the Allied Powers acted in a dual capacity. He was the Supreme Commander of the military occupation of Japan, under the control of the United States and concerning which the Far Eastern Commission could make no recommendations and also acted on behalf of the Allied Powers in carrying out such policy directives as the Far Eastern Commission announced or which were implemented by either the United States or himself.

Whether viewed as the exclusive controlling Power or as a joint Power, it is respectfully submitted that as the United States participated in the requisition of petitioner's vessel it was subject to an action for compensation for the requisitioned property and that the Court of Claims had jurisdiction of such action.

There can be no dispute that if the United States was in exclusive control of the occupation the Court of Claims would have jurisdiction of the action.

Turney, Trustee v. *United States,* 126 Court of Claims 202; 115 F. Supp. 457;

Philippine Sugar Estates Development Co. v. *United States,* 40 Court of Claims 33.

If the General Headquarters of the Supreme Commander for Allied Powers acted for all the Allied Powers, he was the agent for the United States in its individual capacity, and as its agent and representative as one of the Allied Powers. In agreeing to such appointment by the other Powers he was also agent for each of such Powers both jointly and severally and was acting for their joint and several benefits.

The United States thus was a party to a joint venture with other powers all of whom by their own laws and under international law agreed to compensate owners of property which was requisitioned.

Under the circumstances, it is respectfully submitted that the principles of Common Law as to joint ventures should apply in the present case, rendering the United States subject to an action of which the Court of Claims has jurisdiction.

The Court of Claims was in error therefore in dismissing the petition filed in this case in the Court of Claims.

Wherefore, your petitioner respectfully prays that a writ of certiorari be issued out of and under the seal of this Honorable Court directed to the United States Court of Claims, commanding that Court to certify and to send to this Court for its review and determination a full and complete transcript of the record and all proceedings in this case.

ANGLO CHINESE SHIPPING COMPANY, LTD.
Petitioner

By HENRY J. BOGATKO
Counsel for Petitioner

APPENDIX

Opinion

IN THE UNITED STATES COURT OF CLAIMS

No. 587–53

(Decided January 11, 1955)

ANGLO CHINESE SHIPPING COMPANY, LTD., v. THE UNITED STATES

Mr. Henry J. Bogatko for plaintiff.

Mr. John F. Wolf, with whom was *Mr. Assistant Attorney General Warren E. Burger,* for defendant.

ON DEFENDANT'S MOTION TO DISMISS

WHITAKER, *Judge,* delivered the opinion of the court:

The petition alleges: Plaintiff is a corporation organized under the laws of the British Crown Colony of Hong Kong. It brings this suit for the alleged use of its vessel, the *S. S. Josephine Moller,* by the United States during its occupancy of Japan after that country surrendered in World War II. The suit is brought against the United States only, on the theory that it was in control of the forces occupying Japan, although other nations participated in the occupation, and that, therefore, it is liable for any acts done by the occupying powers.

Defendant defends on the ground that the use of plaintiff's vessel was a use by all of the occupying governments, and not by one alone, and that a suit can be maintained only against the group, and not against the individual governments.

Plaintiff's position cannot be maintained. The occupa-

tion of Japan was a joint venture, participated in by the United States of America, the United Kingdom, China, and Russia; and whatever benefit the occupying powers derived from the use of plaintiff's vessel in the laying and repairing of submarine cables was derived by all of them in common and not by any one more than another. Official documents leave no doubt of this.

To begin with, President Roosevelt, acting for the United States of America, Generalissimo Chiang Kai-shek, acting for China, and Prime Minister Churchill, acting for the United Kingdom of Great Britain and Northern Ireland, met at Cairo in 1943, and on December 1, 1943, issued a statement in which they said, among other things:

> The several military missions have agreed upon future military operations against Japan. The Three Great Allies expressed their resolve to bring unrelenting pressure against their brutal enemies by sea, land, and air. This pressure is already rising.
>
> The Three Great Allies are fighting this war to restrain and punish the aggression of Japan. * * *
>
> (App. 1 to Publication 2671 of the Department of State, Far Eastern Series 17.)

Later, the representatives of the leaders of the Soviet Union, the United States of America, and Great Britain met at Yalta and on February 11, 1945, issued an agreement in which they said, among other things:

> The leaders of the three Great Powers—the Soviet Union, the United States of America, and Great Britain—have agreed that in two or three months after Germany has surrendered and the war in Europe has terminated the Soviet Union shall enter into the war against Japan on the side of the Allies * * *.
>
> (App. 2 to the above cited publication.)

Then, on July 26, 1945, the leaders of the United States, China, and Great Britain issued the Potsdam Proclamation, reading:

> (1) We—the President of the United States, the President of the National Government of the Republic of China, and the Prime Minister of Great Britain, representing the hundreds of millions of our countrymen, have conferred and agree that Japan shall be given an opportunity to end this war.
>
> * * * * *
>
> (5) Following are our terms.
>
> * * * * *
>
> (7) Until such a new order is established and until there is convincing proof that Japan's war-making power is destroyed, points in Japanese territory to be designated by the Allies shall be occupied to secure the achievement of the basic objectives we are here setting forth.
>
> * * * * *
>
> (12) The occupying forces of the Allies shall be withdrawn from Japan as soon as these objectives have been accomplished.
>
> * * * * *
>
> (App. 3 to the above cited publication.)

On August 14, 1945, the Japanese accepted the terms of the above Potsdam Proclamation. (See App. 6 to the above cited publication.)

On September 2, 1945, the Instrument of Surrender was signed, which reads in part as follows:

> We, acting by command of and in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters, hereby accept the provisions set forth in the declaration issued by the heads of the Governments of the United

States, China and Great Britain on 26 July 1945, at Potsdam, and subsequently adhered to by the Union of Soviet Socialist Republics, which four powers are hereafter referred to as the Allied Powers.

We hereby proclaim the unconditional surrender *to the Allied Powers* of the Japanese Imperial General Headquarters and of all Japanese armed forces and all armed forces under Japanese control wherever situated.

We hereby command all Japanese forces * * * to comply with all requirements which may be imposed by *the Supreme Commander for the Allied Powers* or by agencies of the Japanese Government at his direction.

* * * * *

The authority of the Emperor and the Japanese Government to rule the state shall be subject to the *Supreme Commander for the Allied Powers* who will take such steps as he deems proper to effectuate these terms of surrender. (Italics ours.)

This instrument was signed by the Japanese and by Douglas MacArthur, "Supreme Commander for the Allied Powers," C. W. Nimitz, "United States Representative," and by representatives of China, the United Kingdom, the Union of Soviet Socialist Republics, Australia, Canada, France, Netherlands, and New Zealand. (App. 8 to the above cited publication.)

Finally, on December 27, 1945, the Foreign Ministers of the Union of Soviet Socialist Republics, the United Kingdom, and the United States of America issued the Moscow Agreement setting up the Far Eastern Commission. This Agreement read in part as follows:

A Far Eastern Commission is hereby established composed of the representatives of the Union of Soviet Socialist Republics, United Kingdom, United States, China, France, the Netherlands, Canada,

Australia, New Zealand, India, and the Philippine Commonwealth.

Functions

A. The functions of the Far Eastern Commission shall be:

1. To formulate the policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished.

2. To review, on the request of any member, any directive issued to the Supreme Commander for the Allied Powers or any action taken by the Supreme Commander involving policy decisions within the jurisdiction of the Commission.

3. To consider such other matters as may be assigned to it by agreement among the participating Governments reached in accordance with the voting procedure provided for in Article V-2 hereunder.

B. The Commission shall not make recommendations with regard to the conduct of military operations nor with regard to territorial adjustments.

C. The Commission in its activities will proceed from the fact that there has been formed an Allied Council for Japan and will respect existing control machinery in Japan, including the chain of command from the United States Government to the Supreme Commander and the Supreme Commander's command of occupation forces.

III. *Functions of the United States Government*

1. The United States Government shall prepare directives in accordance with policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States

Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission.

* * * * *

The United States Government may issue interim directives to the Supreme Commander pending action by the Commission whenever urgent matters arise not covered by policies already formulated by the Commission; provided that any directives dealing with fundamental changes in the Japanese constitutional structure or in the regime of control, or dealing with a change in the Japanese Government as a whole will be issued only following consultation and following the attainment of agreement in the Far Eastern Commission.

(App. 12 to the above cited publication.)

It is clear that the occupation of Japan was a joint venture of the United States, the United Kingdom, the Union of Soviet Socialist Republics, and China; but does that absolve the individual nations from liability for an act taken on behalf of all?

On August 19, 1946, the Supreme Commander for the Allied Powers directed the Japanese Government to report on the location of property they had seized during the war. It reported that the *Josephine Moller*, which it had seized, was at Yokohama. On December 3, 1946, the Supreme Commander notified the British Government that this vessel was available for return to its owners. Later, however, the Supreme Commander directed the Imperial Japanese Government to retain the vessel until October 15, 1948, for the purpose of laying and repairing submarine cables. Later, other directives were issued ordering further retention of the vessel and it was not until March 24, 1950, that the Supreme Commander directed the Japanese Government to return the vessel to the Government of the United Kingdom. It was actually returned on August 4, 1950.

The Allied Powers, of course, was not a body politic. It was an association of sovereign states. Any action taken by the Supreme Commander for the Allied Powers was taken on behalf of the association, of course; but it was also taken on behalf of each one of the Allied Powers. Any action taken by him was taken as the agent of the United States of America, as the agent of Great Britain, and as the agent of China and of Russia. Whatever use there may have been of plaintiff's vessel by the Allied Powers, it was a use by all of them. The Supreme Commander was acting as the agent for each of them.

When private parties or private corporations or municipal corporations enter into a joint venture, the parties are jointly and severally liable for the acts of their agent, and their individual property may be levied upon to satisfy any judgment, at least after the assets of the joint venture have been exhausted. Whether this rule should be applied to sovereign nations engaged in a joint enterprise has never been decided, and we do not now decide it, because we do not think any of the Allied Powers are liable, for the reasons to be stated.

Plaintiff's vessel never came into the possession of the occupying powers. When the Japanese conquered Hong Kong they seized the vessel and it remained in their possession until it was returned to its owners. It is true the Supreme Commander directed them to retain it, but this direction was issued only because the Japanese Government was powerless to act except with the approval of the Supreme Commander.[1] The order directing retention of the vessel read:

> It is directed that the Japanese Ministry of Communications assume responsibility for the operation

---

[1] On September 6, 1945, the President of the United States issued the following order to General MacArthur:

> "1. The authority of the Emperor and the Japanese Government to rule the State is subordinate to you as Supreme Commander for the Allied Powers. You will exercise your authority as you deem proper to carry out your mission. Our relations with Japan do not rest on a con-

> of the vessel, make the necessary arrangements to man and outfit the ship for cable laying operations and proceed with work already approved by General Headquarters, Supreme Commander for the Allied Powers. * * *

The laying and repairing of these cables was for the benefit of Japan. Japan itself outfitted the vessel and manned it and used it in laying and repairing the cables. The responsibility for the use of it in so doing is Japan's responsibility. The cables were not for temporary use by the Allied Powers only during their occupation; they were for long-time use extending far beyond the period of occupation. The fact that the occupying powers got an incidental benefit from the use of them during their occupation renders them no more liable for the cost of laying and repairing them than any other person who might use them. That cost must be borne by Japan. That cost includes payment for the use of plaintiff's vessel.

Manifestly, the occupying powers are not liable for the cost of what Japan has done to rehabilitate herself, although much of the work of doing so may have been approved by or even directed by the Supreme Commander of the Allied Powers.

Defendant's motion is granted, and plaintiff's petition is dismissed.

It is so ordered.

LARAMORE, *Judge;* MADDEN, *Judge;* LITTLETON, *Judge;* and JONES, *Chief Judge*, concur.

---

tractual basis, but on an unconditional surrender. Since your authority is supreme, you will not entertain any question on the part of the Japanese as to its scope.

2. Control of Japan shall be exercised through the Japanese Government to the extent that such an arrangement produces satisfactory results. This does not prejudice your right to act directly if required. You may enforce the orders issued by you by the employment of such measures as you deem necessary, including the use of force.

* * * * *"

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Office - Supreme Court, U. S.
FILED
MAY 16 1955
HAROLD B. WILLEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 708

ANGLO CHINESE SHIPPING COMPANY, LTD.,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

PETITIONER'S REPLY BRIEF

HENRY J. BOGATKO
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IN THE

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No. 708

ANGLO CHINESE SHIPPING COMPANY, LTD.,

Petitioner,

—against—

THE UNITED STATES,

Respondent.

PETITIONER'S REPLY BRIEF

The Government's arguments in opposition to the petition for a writ of certiorari overlook the fact that its motion to dismiss the petition filed in the Court of Claims was made before it filed its answer and was based on the petition filed in that Court and various Governmental publications relating to the participation of the United States in the occupation of Japan.

No affidavits, documents or other information were submitted by the United States to contest or dispute the allegations of the petition filed in the Court of Claims.

For the purpose of the Government's motion to dismiss, therefore, the allegations of the petition are to be deemed admitted.

Russian Volunteer Fleet v. *United States*, 282 U. S. 481.

The petition in the Court of Claims in substance alleges that the United States, acting by and through the Supreme Commander for Allied Powers and the United States Armed Forces, notwithstanding its advices that the petitioner's vessel was reported as looted property and was available for return to the petitioner, directed the Japanese Government to retain the petitioner's vessel subject to the direction of the Supreme Commander for Allied Powers and the United States Armed Forces, for the purpose of laying and repairing submarine cables, as directed and approved by the Supreme Commander and the United States Armed Forces, and thereby deprived the petitioner of the use of its vessel.

The brief submitted by the United States in opposition to the petition for a writ of certiorari apparently does not dispute that there was a taking or "requisition" of petitioner's vessel (see pages 12 to 14 of the Government's brief), but contends that the taking or requisitioning was by and for the benefit of the Japanese Government, relying in part on statements contained in the Court of Claims opinion.

But it is respectfully submitted that there was no basis for the Court of Claims findings, or the Government's contentions based thereon, that the Japanese Government requisitioned petitioner's vessel or that the Japanese Government derived a benefit from the use of the vessel.

It is respectfully submitted that nowhere in the record, either before the Court of Claims or this Court, can there be found any facts to support the following statements in the opinion of the Court of

Claims (Appendix p. 26) upon which the Government relies (Brief in opposition pp. 12-14) as to the use and benefit of the petitioner's vessel:

> "The laying and repairing of these cables was for the benefit of Japan."

or the statement

> "The cables were not for temporary use by the Allied Powers only during their occupation; they were for long time use extending far beyond the period of occupation"

or the statement

> "* * * the occuying powers got an incidental benefit from the use of them during their occupation * * *"

With respect to the contention of the Government on pages 14 and 15 of its brief, that the Japanese Goverment requisitioned the vessel, the directive requiring the Japanese Government to report looted property explicitly provided:

> "The Imperial Japanese Government is directed to retain all such properties under custody and will not permit any transactions or movement of such property."
>
> (See copy of Supreme Commander's memorandum directive dated April 19, 1946 attached to certified transcript of record.)

It is respectfully submitted that being required to report all looted property and prohibited from permitting any transactions or movement of such property, the Japanese Government only had custody of

petitioner's vessel and could not requisition such property for its own benefit.

The only authority directing or controlling such looted property was the Supreme Commander for the Allied Powers and the United States Armed Forces. (See Appendix 13, *Occupation of Japan—Policy and Progress*—State Department Publication 2671—Far Eastern Series 17, pp. 73-81; Appendices 27 and 28, *Activities of the Far Eastern Commission*, Report of Secretary General, Department of State Publication, 2888, pp. 80-83.) As pointed out in the petition for a writ of certiorari (Petition, p. 15), such direction and control, together with actual retention of the vessel, was possession of petitioner's vessel by the occupation forces.

It is respectfully submitted that the Court of Claims was in error in dismissing the petition filed in this case in its Court and that the petition for a writ of certiorari to that Court should be granted.

HENRY J. BOGATKO,
Counsel for Petitioner.

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In the Supreme Court of the United States

OCTOBER TERM, 1954

No. 708

ANGLO CHINESE SHIPPING COMPANY, LTD.,
PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (Pet. App. 19-26),[1] is reported at 127 F. Supp. 553.

JURISDICTION

The order of the Court of Claims was entered on January 11, 1955 (Pet. App. 26). The petition for a writ of certiorari was filed on April 8, 1955.

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[1] References to the petition for a writ of certiorari will hereinafter be designated "Pet." and references to the appendix thereto as "Pet. App."; references to the original petition in the Court of Claims will be designated "P".

The jurisdiction of this Court is invoked under 28 U.S.C. 1255(1).

QUESTION PRESENTED

Whether the retention and use by the Japanese Government during the occupation of Japan, following directives issued by the Supreme Commander for the Allied Powers, of a British vessel for the purpose of laying and repairing cables for long-term use in Japanese waters constitutes a taking by the United States compensable under the Fifth Amendment.

STATEMENT

1. *Background.* On July 26, 1945, the chiefs of state of the United States, Great Britain and China issued the Potsdam Proclamation (*Occupation of Japan—Policy and Progress,* Appendix 3, Department of State Publication No. 2671, Far Eastern Series 17, p. 53) thereby setting in motion the chain of events which culminated in the surrender of Japan. This proclamation, which was subsequently subscribed by the Soviet Government, set forth the terms for the postwar treatment of Japan and called upon the Government of Japan to proclaim the unconditional surrender of all Japanese armed forces. On August 10, 1945, the Japanese Government announced its readiness to accept the terms of the Potsdam Proclamation "with the understanding that the said declaration does not comprise any demand which prejudices the prerogatives of His Majesty as a Sovereign Ruler" (*Occupation of Japan, ibid.,* Appendix 4,

p. 56). Replying on behalf of the four Allied Powers, the United States Secretary of State on the following day informed the Japanese Government (*Occupation of Japan, ibid.,* Appendix 5, pp. 57-58) as follows:

> From the moment of surrender the authority of the Emperor and the Japanese Government to rule the state shall be subject to the Supreme Commander of the Allied powers who will take such steps as he deems proper to effectuate the surrender terms.

Simultaneously with the Japanese acceptance of this interpretation (*Occupation of Japan, ibid.,* Appendix 6, p. 59), General of the Army Douglas MacArthur was appointed Supreme Commander for the Allied Powers to receive the Japanese surrender *(ibid.)*.

During the interim between the acceptance of the surrender terms by the Japanese Government and the formal signing of the Instrument of Surrender, the United States Government issued a document entitled "United States Initial Post-Surrender Policy for Japan" (*Occupation of Japan, ibid.,* Appendix 13, p. 73). This document set forth as follows the policy of this Government with respect to the status of the Japanese Government:

> There will be a military occupation of the Japanese home islands to carry into effect the surrender terms and further the achievement of the ultimate objectives stated above.* * *

The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and control of Japan.

In view of the present character of Japanese society and the desire of the United States to attain its objectives with a minimum commitment of its forces and resources, the Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, to the extent that this satisfactorily furthers United States objectives. The Japanese Government will be permitted, under his instructions, to exercise the normal powers of government in matters of domestic administration. This policy, however, will be subject to the right and duty of the Supreme Commander to require changes in governmental machinery or personnel or to act directly if the Emperor or other Japanese authority does not satisfactorily meet the requirements of the Supreme Commander in effectuating the surrender terms. * * * [*Ibid.*, at pp. 74, 75.]

Full and prompt restitution will be required of all identifiable looted property. [*Ibid.*, at p. 80.]

Meanwhile, the first units of the occupying forces were landing in Japan (*Occupation of Japan, ibid.*, p. 5). Although these units as well as the bulk of the occupation army which later arrived consisted of United States troops, some 45,000 troops of the British Commonwealth eventually landed in Japan to take part in the occupation (*Occupation of Japan, ibid.*, p. 15).

On September 2, 1945, the Instrument of Surrender (*Occupation of Japan, ibid.*, Appendix 8, p. 62) was signed in Tokyo Bay by Douglas MacArthur in his capacity as Supreme Commander for the Allied Powers; by two Japanese officials "in behalf of the Emperor of Japan, the Japanese Government and the Japanese Imperial General Headquarters"; and by nine persons as representatives of the various individual United Nations governments. Admiral Chester W. Nimitz signed as the United States representative.

On December 27, 1945, the United States, the United Kingdom and the Soviet Union, with the concurrence of China, announced the establishment of a Far Eastern Commission to be composed of representatives of eleven United Nations governments for the purpose of formulating "policies, principles, and standards in conformity with which the fulfillment by Japan of its obligations under the Terms of Surrender may be accomplished," as well as for the purpose of exercising certain other broad supervisory powers over the occupation of Japan (*Occupation of Japan, ibid.*, Appendix 12,

pp. 67-73). The Supreme Commander was recognized, however, as "the sole executive authority for the Allied Powers in Japan" (*ibid.*, at p. 72). In implementing the policy decisions of the Far Eastern Commission, the function of the United States Government was to be as follows:

> 1. The United States Government shall prepare directives in accordance with the policy decisions of the Commission and shall transmit them to the Supreme Commander through the appropriate United States Government agency. The Supreme Commander shall be charged with the implementation of the directives which express the policy decisions of the Commission. [*Ibid.*, at p. 70.]

On July 18, 1946, the Far Eastern Commission published a Policy Decision entitled "Restitution of Looted Property," to which minor amendments were made by a further Policy Decision of October 10, 1946 (*Activities of the Far Eastern Commission*, Appendicies 27 and 28, Department of State Publication No. 2888, Far Eastern Series 24, pp. 80-83). These Decisions outlined measures to be taken looking to the restoration to Allied countries of ships found in Japanese waters which were identified as having been registered in Allied countries at the time of their seizure. In order that such ships might be returned in a condition substantially similar to that at the time of their seizure, necessary repairs and refitting were to be carried out and the cost charged to the Japanese Government.

It was not until June 19, 1947, that the Far Eastern Commission published a Policy Decision on "Basic Post-Surrender Policy for Japan" (*Activities of the Far Eastern Commission, ibid.*, Appendix 5, p. 49). Meanwhile, general elections had been held in Japan in April, 1946 (*Occupation of Japan, supra,* Appendix 30, p. 140) and a new Japanese constitution had been officially promulgated on November 3, 1946 (*Activities of the Far Eastern Commission, supra,* p. 15). The Policy Decision enunciated the following policy with respect to the relation of the occupying powers to the Japanese Government (*Activities of the Far Eastern Commission, ibid.*, Appendix 5, at pp. 51-52):

> The authority of the Emperor and the Japanese Government will be subject to the Supreme Commander, who will possess all powers necessary to effectuate the surrender terms and to carry out the policies established for the conduct of the occupation and the control of Japan.
>
> The Supreme Commander will exercise his authority through Japanese governmental machinery and agencies, including the Emperor, but only to the extent that this satisfactorily furthers the objectives and policies stated herein. According to the judgment and discretion of the Supreme Commander, the Japanese Government may be permitted to exercise the normal powers of government in matters of domestic administration, or the Su-

> preme Commander may in any case direct action to be taken without making use of the agencies of the Japanese Government.

On April 28, 1952, the multilateral Treaty of Peace with Japan (see copy attached to certified transcript of record) entered into force and the office of the Supreme Commander for the Allied Powers ceased to exist on that date (17 F.R. 3689).

2. *The instant proceeding.* In this suit, petitioner, a British corporation, is seeking just compensation under the Fifth Amendment for the alleged taking for public use by the United States of petitioner's vessel, the SS "Josephine Moller," during the occupation of Japan. The vessel had been captured by the Japanese Government in the harbor of Hong Kong early in World War II (P. 2). She was renamed the "Sagami Maru" and appropriated to the use of the Japanese Government, which retained the vessel throughout the balance of the war (P. 2). In December, 1946, the vessel was located at Yokohama and identified as looted property (P. 3). See *supra,* pp. 4, 6. The British Ministry of Transport and, through it, the petitioner were notified to this effect (P. 3).

On January 10, 1947, however, General Headquarters, Supreme Commander for the Allied Powers, sent a Memorandum (Schedule A, P. 7 and 8) to the Imperial Japanese Government directing that:

> 1. The SS "Sagami Maru" ex British cargo vessel, SS "Josephine Moller", will be retained in Japanese waters for a period of one

year to be operated for the purpose of laying and repairing submarine cables, as directed by the Supreme Commander for the Allied Powers. * * *

2. It is directed that the Japanese Ministry of Communications assume responsibility for the operation of the vessel, make the necessary arrangements to man and outfit the ship for cable laying operations and proceed with work already approved by General Headquarters, Supreme Commander for the Allied Powers. * * *

This Memorandum was subsequently amended by Memoranda (Schedules B and C, P. 8-10) extending the time for the retention of the vessel by the Japanese Government, and by Memoranda (Schedules D through G, P. 11-18) directing the refitting of the vessel and its return to the British Government.

On August 4, 1950, the "Josephine Moller" was formally delivered to the Government of the United Kingdom at Hong Kong by the Japanese Government. The delivery was acknowledged by a "Receipt for Restoration of Property" (Schedule H, P. 19) signed by the Japanese captain of the vessel "On Behalf of the Japanese Government" and by the British Governor of Hong Kong "On Behalf of the Government of the United Kingdom." This document attested

* * * to the fact that the authorized representative of the Japanese Government has on this date, at Hong Kong, China delivered and

> transferred, and thereby restored the SS "Josephine Moller" (Japanese Name "Sagami Maru") together with the title thereto and custody thereof to the Government of the United Kingdom and such Government has accepted delivery, restoration, ownership and custody of the property from the Japanese Government, and agrees to take possession of the same immediately. * * *
>
> 1. Nothing herein set forth, or done pursuant hereto, will be permitted to prejudice any other rights or claims that the Government of the United Kingdom may have against the Japanese Government with respect to the property: SS "Josephine Moller".

On the same date the vessel was transferred over to her former owner, petitioner herein (Schedule I, P. 20).

In its complaint filed in the Court of Claims on October 28, 1953, petitioner, in addition to alleging the foregoing, asserted that the Supreme Commander for the Allied Powers, acting for and in behalf of the United States Government, had failed and refused to pay petitioner any compensation for the requisition of its vessel and for having deprived petitioner of the use thereof (P. 5). The complaint sought recovery of about $450,000 plus interest as just compensation for the requisition of the vessel (P. 6). As stated by the Court of Claims (Pet. App. 19):

> The suit is brought against the United States only, on the theory that it was in control of the forces occupying Japan, although other nations participated in the occupation, and that, therefore, it is liable for any acts done by the occupying powers.

The Court of Claims granted the Government's motion to dismiss for lack of jurisdiction, holding that the requisition of the vessel had been not by the United States but rather by the Japanese Government and consequently that the occupying powers including the United States were not liable for the requisition (Pet. App. 25-26).

ARGUMENT

The broad questions of international and constitutional law which petitioner seeks to raise in this case were not reached by the Court of Claims since their resolution was unnecessary on the facts as found by that court. On the facts as found, the case raises only narrow questions which, we submit, were properly resolved by the Court of Claims. Moreover, these questions have no general or prospective importance; the Treaty of Peace with Japan of April 28, 1952, terminated the office of Supreme Commander for the Allied Powers and, so far as we have been able to ascertain, there are no other pending cases raising these questions.

1. The findings by the court below that petitioner's vessel was at all times retained by the

Japanese Government for its own use and never came into the actual possession or use of the Allied Powers is dispositive of this case and makes unnecessary resolution of the broad questions sought to be raised by the petition. The court found (Pet. App. 25-26):

> * * * When the Japanese conquered Hong Kong they seized the vessel and it remained in their possession until it was returned to its owners. It is true the Supreme Commander directed them to retain it, but this direction was issued only because the Japanese Government was powerless to act except with the approval of the Supreme Commander. * * *
>
> The laying and repairing of [the] cables was for the benefit of Japan. Japan itself outfitted the vessel and manned it and used it in laying and repairing the cables. The responsibility for the use of it in so doing is Japan's responsibility. The cables were not for temporary use by the Allied Powers only during their occupation; they were for long-time use extending far beyond the period of occupation.

Based upon these findings, the court held that the retention or, to use petitioner's phrase, the "requisition" of petitioner's vessel was accomplished by the Japanese Government itself, and that during the period of retention the vessel was devoted to the rehabilitation of Japan herself and not to uses primarily beneficial to the occupying powers. Consequently, as the Court of Claims

held, the cost of laying and repairing the cables which includes the costs for the use of petitioner's vessel "must be borne by Japan." (Pet. App. 26). It was further held that the fact that many of the actions of the Japanese Government were approved or even directed by the Supreme Commander for the Allied Powers did not affect their character as acts of the Japanese Government (Pet. App. 25). The conclusion that there had not been a taking by the United States necessarily followed without the necessity of considering any broader issues.[2]

2. Petitioner does not dispute the fact that actual possession remained at all times in the Japanese Government; it contends rather that "The law recognizes that there can be a requisition of the *use* of a vessel with or without possession" (Pet. 12), and that the United States Government, either directly or through its participation in the

---

[2] Even if it be assumed that there was a requisition by the Supreme Commander for the Allied Powers, it does not follow that the United States would be liable therefor. Petitioner's theory that the United States would be liable because General MacArthur was not only the Supreme Commander for the Allied Powers but also Commander in Chief of the American Forces in Japan, and as such an agent for the United States Government, has been rejected by this Court. Cf. *Hirota* v. *MacArthur*, 338 U. S. 197, where this Court held that acts done by General MacArthur in his role as Supreme Commander for the Allied Powers—and the directives here were issued in that capacity—were done "as the agent of the Allied Powers," and not as the agent of the United States Government. See also *Lake Ontario Land Development and Beach Protection Association, Inc.* v. *Federal Power Commission*, 212 F. 2d 227, 233 (C.A.D.C.), certiorari denied, 347 U.S. 1015.

occupation as one of the Allied Powers, had such use of its vessel. But the Court of Claims has found as a matter of fact that the use of the vessel was devoted by the Japanese Government to its own long run use and only incidentally to the benefit of the Allied Powers (Pet. App. 25-26); consequently, even if petitioner's legal proposition is correct it cannot aid its case.

3. Petitioner appears to urge that, although the vessel was retained and used by the Japanese Government, the United States nevertheless is liable since, according to petitioner, the Japanese Government during the period in question was not a separate entity and was instead a mere projection of the will of the Supreme Commander for the Allied Powers (Pet. 15). However, the publications of the Department of State, particularly those portions set out, *supra,* pp. 3-4, clearly demonstrate that despite the control and supervision of the Supreme Commander for the Allied Powers the Japanese Government was nevertheless regarded by the State Department as a sovereign entity capable of performing acts for which it would be responsible and for which it could be held accountable. And it is established that whether a foreign government is to be regarded as a sovereign entity and "as representative of a foreign sovereign state is a political rather than a judicial question, and is to be determined by the political department of the government." *Guaranty Trust Co.* v. *United States,* 304 U. S. 126, 137; *United States* v. *Pink,* 315 U. S. 203, 229.

Any doubts as to the State Department's views as to the sovereignty of Japan are put to rest by that Department's certification in *Japanese Government* v. *Commercial Casualty Ins. Co.,* 101 F. Supp. 243 (S. D. N. Y.). It was there certified in a letter dated October 4, 1951, and signed by the Assistant Legal Advisor of the Department of State (see 101 F. Supp. at 250):

* * * * *

> that at the time of the commencement of this action, *the Japanese Government was a sovereign government recognized as such by the Government of the United States;*
>
> that the Supreme Commander for the Allied Powers (SCAP) was appointed, authorized and directed by the Allied Powers concerned with the occupation of Japan to direct and control the acts and conduct of the Japanese Government and of Japanese nationals; * * * [emphasis supplied].

The court in that case considered itself bound by the quoted certification as an expression of the views of the political department of the government on a political question (*ibid* at p. 246; cf. *Ex Parte Peru,* 318 U. S. 578; *Compania Espanola* v. *Navemar,* 303 U. S. 68), and held that the Japanese Government was an entity capable of bringing suit in the United States district courts (101 F. Supp. at p. 246):

> With the recognition of the Japanese Government by the United States there goes ac-

knowledgment that it "will be permitted to hold its place and rank, in the character of an independent political organism." Moore, *International Law Digest*, Vol. 1, p. 72. That "the government of Japan does not have diplomatic representation in the United States * * *" * * * does not alter its status as a sovereign government recognized as such by the United States government.

The fact that the Japanese Government during the occupation had sufficient recognized identity to bring suit in its own behalf in the United States is persuasive that it had capacity to perform acts in furtherance of its own rehabilitation and to take responsibility for those acts. Indeed, there is no doubt that petitioner has a remedy against the Japanese Government; petitioner has merely to avail itself of the remedy clearly authorized by the terms of the "Receipt for Restoration of Property" (Schedule H, P. 19), of asserting its claim against the Japanese Government through its own government, the United Kingdom, or alternatively of suing directly in the Japanese courts, as permitted by Article 12 of the Peace Treaty.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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